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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 BROOKEY LEE WEST,

9 *Petitioner,*

10 vs.

11
12 SHERYL FOSTER, *et al.*,

13 *Respondents.*
14

2:07-cv-00021-KJD-GWF

ORDER

15 This habeas matter under 28 U.S.C. § 2254 comes before the Court for a decision on
16 the merits on the multiple grounds presented, including petitioner's challenge to the
17 sufficiency of the evidence as to proof that the victim died by way of criminal agency.

18 ***Background***

19 Petitioner Brooke Lee West seeks to set aside her 2001 Nevada state conviction,
20 pursuant to a jury verdict, of first-degree murder. She is serving a life sentence without the
21 possibility of parole.

22 The Supreme Court of Nevada set forth a detailed summary of the trial evidence in its
23 published decision. See *West v. State*, 119 Nev. 410, 411-15, 75 P.3d 808, 809-12 (2003).
24 The parties do not challenge the accuracy of the state supreme court's recital, which is
25 presumed to be correct unless shown to be incorrect by clear and convincing evidence.
26 See, e.g., *Sims v. Brown*, 425 F.3d 560, 563 n.1 (9th Cir. 2005).

27 In broad overview, the decomposing body of West's mother, Christine Smith, was
28 found on February 5, 2001, in a storage unit in Las Vegas in a plastic garbage can that had

1 been sealed with duct tape, garbage bags, and cellophane wrap. Smith's body was
2 discovered after the general manager responded to complaints of a foul smell, investigated
3 and himself smelled a foul odor emanating from the unit, opened the unit and observed the
4 garbage can with a substance oozing out, and then called the police.¹

5 Trial witnesses had last seen Christine Smith alive approximately three years earlier
6 in February 1998. At that time, Smith told a neighbor that she was going to live with her son
7 Travis Smith, Jr. and his girlfriend in their apartment in California. However, Smith had told
8 the neighbor on a prior occasion that Travis was a homeless drug addict. Prosecution
9 investigators were not able to locate Travis Smith, Jr. during their investigation in 2001.

10 During and after February 1998, until the discovery of her mother's body, West
11 continued to maintain that she had taken her mother to live with Travis in California and that
12 Smith continued to live there. A neighbor who helped West move out of Smith's apartment
13 after Smith purportedly had left observed, however, that a valuable ring and wool cap that
14 Smith had worn every day still were in the apartment.

15 The storage unit had been rented in the names of Brookey West and Christine Smith
16 beginning on June 26, 1998. The rental payments for the unit were made by West. She last
17 accessed the unit on November 16, 2000, prior to the discovery of the body on February 5,
18 2001.²

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21 ¹The additional factual background in the text that is not specifically set forth in the state supreme
22 court summary can be found in #21, Ex. 28, at 11-15.

23 This Court makes no credibility findings or other factual findings regarding the truth or falsity of
24 evidence or statements of fact in the state court. The Court summarizes same solely as background to the
25 issues presented in this case, and it does not summarize all such material. No statement of fact made in
26 describing statements, testimony or other evidence in the state court constitutes a finding by this Court.

27 The significance of additional specific evidence or categories of evidence relied upon by petitioner in
28 support of her claims is discussed in the discussion of the particular claims. The present brief factual recital
constitutes only a broad overview for context. Any absence of mention of a specific piece of evidence or
category of evidence in this broad overview does not signify that this Court has overlooked or ignored such
evidence in considering petitioner's claims.

²The additional factual detail not reflected in the state court opinion is found in #21, Ex. 28, at 16-23.

1 The defense stipulated at trial that West admitted placing her mother's body in the
2 storage unit.

3 The forensic pathologist testified that Smith's body had been sealed in the garbage can
4 for a minimum of six months and likely for "much longer than six months," with his impression
5 being that "it had been at least a year." The forensic entomologist testified that, taking into
6 account the type of maggots found inside the garbage can with the body, Smith's body was
7 placed in the garbage can within eight hours of her death. Rigor mortis would not set in until
8 four to eight hours after death, peaking at approximately twelve hours, so rigor would not
9 necessarily impede placing a body in a trash can during that time frame.³

10 When Smith's body was discovered in the garbage can, a white plastic bag covered
11 her face from the bridge of her nose, about midway up over the orbital sockets, to her chin.
12 The bag was tied in a knot behind her head at the base of her neck. A hair was caught in the
13 knot, potentially consistent with the knot having been tied hastily. The bag was tied tightly and
14 would have been even tighter before decomposition. The forensic pathologist could not testify
15 whether the plastic bag had been placed on Smith's face before or after her death, and he
16 could not rule out the possibility that the bag originally had covered her eyes and then slipped
17 or slid down her face during decomposition.⁴

18 The forensic pathologist could not determine the cause and manner of Smith's death
19 because of the advanced decomposition of the body. He testified that the presence of the
20 plastic bag over Smith's face was consistent with suffocation, but he was unable to determine
21 that Smith died by suffocation due to the decomposition of the body. He testified that it was
22 possible that Smith was placed in the airtight garbage can while still alive.

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25 ³The additional factual detail not reflected in the state court opinion is found in #22, Ex. 30, at 25-26 &
26 46-50; *id.*, Ex. 31, at 25-27.

27 ⁴The additional factual detail not reflected in the state court opinion is found in #22, Ex. 30, at 28-32;
28 *id.*, Ex. 31, at 28-36 (forensic pathologist); *id.*, Ex. 31, at 70-72 (crime scene analyst); *id.*, Ex. 32, at 4-15
(crime scene analyst).

1 Smith's death also was consistent with natural causes. The forensic pathologist could
 2 not rule out a possible heart attack. At the time of her death, Smith was approximately 64
 3 years of age with asthma and moderate obstruction in her lungs, with respiratory testing – at
 4 one of two tests taken – reflecting a “lung age” of 132 years. A neighbor testified that Smith
 5 appeared very ill and lethargic when she last saw her in February 1998.

6 Numerous ATM withdrawals were made from Smith's Las Vegas bank account after
 7 she was last seen by trial witnesses in February 1998 and prior to the time that police
 8 discovered her body in February 2001. The withdrawals in Las Vegas were made from
 9 automated teller machines in convenience stores, and a visual record of such a withdrawal
 10 would not be preserved on a video recording. Smith's social security payments regularly were
 11 direct-deposited to the account during this time.⁵

12 Some trial witnesses testified that Smith and West had a good mother-daughter
 13 relationship. Other witnesses testified that West had a strained relationship with Smith, with
 14 West calling her mother controlling and a sociopath.

15 ***Governing Standard of Review***

16 The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a “highly
 17 deferential standard for evaluating state-court rulings.” *Lindh v. Murphy*, 521 U.S. 320, 333
 18 n. 7, 117 S.Ct. 2059, 2066 n.7, 138 L.Ed.2d 481 (1997). Under this deferential standard of
 19 review, a federal court may not grant habeas relief merely on the basis that a state court
 20 decision was incorrect or erroneous. *E.g.*, *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir.
 21 2003). Instead, under 28 U.S.C. § 2254(d), the federal court may grant habeas relief only if
 22 the decision: (1) was either contrary to or involved an unreasonable application of clearly
 23 established federal law as determined by the United States Supreme Court; or (2) was based
 24 on an unreasonable determination of the facts in light of the evidence presented in the state
 25 court. *E.g.*, *Mitchell v. Esparza*, 540 U.S. 12, 15, 124 S.Ct. 7, 10, 157 L.Ed.2d 263 (2003).

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 28 ⁵The additional factual detail not reflected in the state court opinion is found in #22, Ex. 33, at 133-38;
 #23, Ex. 35, at 36, 122-28, 151-52 & 157-59; *id.*, at 162-69; #24, Ex. 37, at 121-22 & 136-38.

1 A state court decision is “contrary to” law clearly established by the Supreme Court only
 2 if it applies a rule that contradicts the governing law set forth in Supreme Court case law or
 3 if the decision confronts a set of facts that are materially indistinguishable from a Supreme
 4 Court decision and nevertheless arrives at a different result. *E.g.*, *Mitchell*, 540 U.S. at 15-16,
 5 124 S.Ct. at 10. A state court decision is not contrary to established federal law merely
 6 because it does not cite the Supreme Court’s opinions. *Id.* Indeed, the Supreme Court has
 7 held that a state court need not even be aware of its precedents, so long as neither the
 8 reasoning nor the result of its decision contradicts them. *Id.* Moreover, “[a] federal court may
 9 not overrule a state court for simply holding a view different from its own, when the precedent
 10 from [the Supreme] Court is, at best, ambiguous.” *Mitchell*, 540 U.S. at 17, 124 S.Ct. at 11.
 11 For, at bottom, a decision that does not conflict with the reasoning or holdings of Supreme
 12 Court precedent is not contrary to clearly established federal law.

13 A state court decision constitutes an “unreasonable application” of clearly established
 14 federal law only if it is demonstrated that the state court’s application of Supreme Court
 15 precedent to the facts of the case was not only incorrect but “objectively unreasonable.” *E.g.*,
 16 *Mitchell*, 540 U.S. at 18, 124 S.Ct. at 12; *Davis v. Woodford*, 333 F.3d 982, 990 (9th Cir. 2003).

17 To the extent that the state court’s factual findings are challenged intrinsically based
 18 upon evidence in the state court record, the “unreasonable determination of fact” clause of
 19 Section 2254(d)(2) controls on federal habeas review. *E.g.*, *Lambert v. Blodgett*, 393 F.3d
 20 943, 972 (9th Cir. 2004). This clause requires that the federal courts “must be particularly
 21 deferential” to state court factual determinations. *Id.* The governing standard is not satisfied
 22 by a showing merely that the state court finding was “clearly erroneous.” 393 F.3d at 973.
 23 Rather, the AEDPA requires substantially more deference:

24 [I]n concluding that a state-court finding is unsupported by
 25 substantial evidence in the state-court record, it is not enough that
 26 we would reverse in similar circumstances if this were an appeal
 27 from a district court decision. Rather, we must be convinced that
 an appellate panel, applying the normal standards of appellate
 review, could not reasonably conclude that the finding is
 supported by the record.

28 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004); see also *Lambert*, 393 F.3d at 972. If

the state court factual findings withstand intrinsic review under this deferential standard, they then are clothed in a presumption of correctness under 28 U.S.C. § 2254(e)(1); and they may be overturned based on new evidence offered for the first time in federal court, if other procedural prerequisites are met, only on clear and convincing proof. 393 F.3d at 972.

The petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to habeas relief. *Davis*, 333 F.3d at 991.

Discussion

Ground 1: Sufficiency of the Evidence

In Ground 1, petitioner alleges that she was denied her right to due process in violation of the Fifth, Sixth and Fourteenth Amendments because the evidence was insufficient to prove beyond a reasonable doubt the essential element of the offense that Christine Smith's death occurred by the criminal agency of another person.

In its published decision, the Supreme Court of Nevada rejected the claim presented to that court on the following grounds:

West contends that there was insufficient evidence adduced at trial to establish that Smith died as the result of a criminal act rather than natural causes. Accordingly, West asserts that her murder conviction must be reversed. We disagree.

[2][3] The corpus delicti rule in Nevada is well established. To prove that a murder has been committed, the State must demonstrate: "(1) the fact of death, and (2) that death occurred by criminal agency of another." At trial, the State bears the burden of establishing the corpus delicti beyond a reasonable doubt, based on direct or circumstantial evidence. When reviewing the sufficiency of the evidence, we consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." West argues that there was less proof of death by criminal agency in her case than in the previous cases in which this court reversed based on insufficient evidence of corpus delicti, namely, *Frutiger v. State*, *Hicks v. Sheriff*, and *Azbill v. State*.

[The court then discusses the particular facts presented respectively in *Frutiger*, *Hicks*, and *Azbill*.]

[4] We disagree with West that the above cases support her contention that there was insufficient evidence of corpus

delicti in the instant case, especially in light of our recent decision in *Middleton v. State*.^[FN19] In *Middleton*, we noted that “there is no requirement that there be evidence of a specific cause of death.” And, “[t]he court must consider and weigh all the evidence offered which bears on the question of death by criminal agency.” Using this standard, we upheld David Stephen Middleton's murder convictions, concluding that although the victims' actual causes of death could not be determined from examination of the bodies due to decomposition, “the circumstances of the disappearances of the women, the discoveries of their bodies in remote locations, tied with rope, wrapped in garbage bags, bitten severely, clearly creates a reasonable inference of their deaths by criminal agency.” Accordingly, the State may establish corpus delicti solely with circumstantial evidence, notwithstanding the lack of a body or lack of evidence of the actual cause of death due to decomposition or dismemberment of the body.

FN19. 114 Nev. 1089, 968 P.2d 296 (1998).

In considering the weight of the evidence in the present case, we conclude that there was sufficient evidence of corpus delicti, notwithstanding the fact that the actual cause of Smith's death could not be determined. Similar to *Middleton*, the circumstances of Smith's disappearance, the discovery of her body in a garbage can that was sealed with great effort to make it airtight and located in a storage unit that West rented, the admission that West put Smith in the garbage can, and the discovery of the plastic bag that covered Smith's nose and mouth, clearly created a reasonable inference of Smith's death by criminal agency. Although Smith and West informed Smith's friends and neighbors that West was taking Smith to California to live with Travis Jr., several witnesses testified that Smith left behind several personal items when she disappeared, and there was evidence that Travis Jr. was a recluse. Finally, even though West presented medical evidence that Smith may have died by natural causes, the jury was at liberty to weigh this evidence along with the evidence that Smith died by criminal agency.^[FN24]

FN24. See *Middleton*, 114 Nev. at 1102-03, 968 P.2d at 306 (noting that when there is conflicting testimony at trial, the jury, and not this court, determines the weight and credibility of the testimony).

119 Nev. at 415-18, 75 P.3d at 812-14 (citation footnotes 2-18 & 20-23 omitted).

The state supreme court's rejection of this claim was neither contrary to nor an unreasonable application of clearly established federal law.

On a challenge to the sufficiency of the evidence, the habeas petitioner faces a “considerable hurdle.” *Davis v. Woodford*, 333 F.3d 982, 992 (9th Cir. 2003). Under the

1 standard announced in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560
2 (1979), the jury's verdict must stand if, after viewing the evidence in the light most favorable
3 to the prosecution, any rational trier of fact could have found the essential elements of the
4 offense beyond a reasonable doubt. *E.g.*, *Davis*, 333 F.3d at 992. Accordingly, the reviewing
5 court, when faced with a record of historical facts that supports conflicting inferences, must
6 presume that the trier of fact resolved any such conflicts in favor of the prosecution and defer
7 to that resolution, even if the resolution by the state court trier of fact of specific conflicts does
8 not affirmatively appear in the record. *Id.* The *Jackson* standard is applied with reference to
9 the substantive elements of the criminal offense as defined by state law. *E.g.*, *Davis*, 333
10 F.3d at 992. When the deferential standards of the AEDPA and *Jackson* are applied
11 together, the controlling question for decision on federal habeas review thus becomes one
12 of whether the Nevada Supreme Court's decision reflected an unreasonable application of
13 the *Jackson* standard to the evidence presented at trial. *See, e.g.*, *Juan H. v. Allen*, 408 F.3d
14 1262, 1274-75 (9th Cir. 2005).

15 In the present case, petitioner focuses at length upon evidence pertaining to cause of
16 death. Petitioner points to: (a) the absence of testimony from the forensic pathologist
17 establishing the cause of death to a medical certainty; (b) expert testimony finding no forensic
18 or medical evidence consistent with various forms of homicide – other than suffocation – such
19 as shooting, stabbing, or blunt force trauma; and (c) expert testimony acknowledging that the
20 evidence available also was at least not inconsistent with possible alternative natural causes
21 of death associated with Christine Smith's general age, medical conditions, and/or statistically
22 possible complications from her medication regime.

23 Under *Middleton*, however, the State was not required to medically prove the specific
24 cause of death in order to satisfy the *corpus delicti* element under Nevada substantive law.
25 Petitioner thus can delineate each and every facet of the evidence going to the question of
26 cause of death, as she has done at length, and still not demonstrate on federal habeas review
27 that the evidence was insufficient to establish the *corpus delicti* element. Rather, under
28 *Middleton*, the trier of fact was permitted to infer from other circumstances that the decedent

1 died from criminal agency rather than from natural causes. Those surrounding circumstances
2 in this case included West's admitted hiding of the body in a manner that reflected an intent
3 to avoid detection, the presence of a plastic bag covering the decedent's airways when the
4 body was discovered, evidence supporting an inference that the brother Travis did not have
5 a stable home in California to move the mother to in the first instance, and West's active
6 concealment of her mother's death for years thereafter, right up until the discovery of her
7 body. The Nevada Supreme Court's holding that these circumstances sufficiently supported
8 an inference beyond a reasonable doubt that Christine Smith died from foul play rather than
9 from natural causes was neither contrary to nor an unreasonable application of *Jackson*.

10 Petitioner further points to variances in or competing inferences that might be drawn
11 from the circumstantial evidence. For example, petitioner relies upon the testimony of a
12 disinterested witness who observed Smith sitting in the car at a time when packed boxes also
13 were visible, with West saying that she was taking her mother to California to live with her
14 brother. Petitioner further points to evidence that she was a successful technical writer who
15 ostensibly had no need for her mother's social security payments.

16 However, the resolution of conflicts in the evidence and between competing inferences
17 to be drawn from the evidence was a matter committed to the jury. Rational jurors potentially
18 could have concluded that West continued the charade up through the point observed by the
19 witness, with the mother still believing in the deception that she was on her way to stay with
20 her son. Notably, no trial evidence tended to establish that Smith ever was seen thereafter
21 living in California or that her son – in fact – then had an established homestead for her to go
22 to. Further, there was evidence from which a rational trier of fact could conclude that the
23 writing income was not necessarily a tap that West could reliably turn on and maintain
24 whenever she wished.⁶ Nor was the State required to prove motive. It is established law,
25 under *Jackson*, that the reviewing courts must presume that the trier of fact resolved any such
26 conflicts in favor of the prosecution and must defer to that resolution.

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28 ⁶See #23, Ex. 36, at 33-36, 61-63, 66-67 & 80-85. See also #21, Ex. 26, at 34-36 (State's opening).

1 The state supreme court's rejection of Ground 1 thus was neither contrary to nor an
2 unreasonable application of clearly established federal law.

3 Ground 1 accordingly does not provide a basis for federal habeas relief. The Court will
4 grant a certificate of appealability on this claim, however, as jurists of reason would find the
5 issue to be a debatable one.⁷

6
7 ⁷Federal habeas counsel adds a new and different claim challenging the sufficiency of the evidence
8 for the first time in the reply that does not appear to have been exhausted on direct appeal. Counsel alleges
9 that the evidence was insufficient to prove that West committed first-degree murder because the State failed
10 to prove that the murder was premeditated, willful and deliberate. The reply is not a vehicle for amending the
11 petition with new claims. In order to amend the petition after respondents have answered, petitioner instead
12 must file a motion for leave to amend the petition and must demonstrate that such amendment would not be
futile due to concerns of, *inter alia*, lack of exhaustion and untimeliness. Over and above the fact that West is
represented by counsel who is familiar with the procedural requirements for amending a petition, this Court
repeatedly has admonished the Federal Public Defender in prior cases that the reply is not a proper vehicle
for amending the petition and that the Court will not countenance such attempted improper "sandbagging" in
the reply.

13 The Court notes in this regard that the Federal Public Defender has argued in the past that the
14 exhaustion requirement is satisfied as to a newly-presented claim because the claim allegedly would be
15 procedurally defaulted in the state courts, as a prelude to then seeking to overcome the procedural default on
16 arguments presented for the first time in federal court. As this Court frequently has noted, however, the
17 standards for excusing a procedural default are substantially the same in Nevada state court as they are in
18 federal court. *See, e.g., Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (Nev. 2006)(recognizing
19 cause and prejudice as well as actual innocence based exceptions to state procedural bars); *see also*
Robinson v. Ignacio, 360 F.3d 1044, 1052 n.3 (9th Cir. 2004)(recognizing that Nevada's cause and prejudice
analysis and the federal cause and prejudice analysis are nearly identical); *accord Jones v. McDaniel*, 2009
WL 890915 (9th Cir., Apr. 2, 2009)(in an unpublished disposition, holding that the petitioner had not
established futility of exhaustion given the substantial similarity of Nevada state and federal standards to
overcome a procedural bar).

20 Accordingly, this Court will not hold claims to be exhausted on the premise that the claims would be
21 procedurally defaulted in the Nevada state courts in the absence of an unequivocal stipulation by petitioner
22 that the unexhausted claims in fact would be denied on state procedural grounds if he returned to state court
23 to present the claims. Any holding of exhaustion on this basis further would be subject to respondents' ability
24 to then seek dismissal of the claims on the basis of procedural default. Such an unequivocal stipulation, to in
25 truth be unequivocal in light of the application of the procedural default rules under Nevada state procedure,
26 would have to include concessions that: (1) petitioner cannot avoid dismissal of the claims in the state courts
27 because he cannot demonstrate cause and prejudice in the state courts to overcome the state procedural
bars; (2) petitioner cannot avoid dismissal of the claims in the state courts because he cannot demonstrate in
the state courts that the alleged constitutional violation has probably resulted in the conviction of one who is
actually innocent and cannot thereby overcome these procedural bars; and (3) the procedural bars otherwise
are now consistently applied by the Nevada state courts, such that it is not possible that the state courts, as a
discretionary matter, would consider the claims despite the procedural default and despite a failure to
demonstrate either cause and prejudice or actual innocence. In the absence of such concessions, the Court
will not hold that there is no possibility that the unexhausted claims would be considered by the state courts.

28 (continued...)

Ground 2: Adequate Notice in the Charging Instrument

In Ground 2, petitioner alleges that she was denied her right to due process in violation of the Fifth, Sixth and Fourteenth Amendments because the information failed to give adequate notice of the charged crime, in that, *inter alia*, the information charged her with murder by “1) . . . asphyxiation, strangulation and/or 2) cause or means unknown.”

The Supreme Court of Nevada rejected the claim presented to that court on the following grounds:

[5] West next challenges the charging document, arguing that it failed to provide her adequate notice of the State’s theory of murder. Because this challenge involves a constitutional issue, we review de novo whether the charging document complied with constitutional requirements.

[6][7] Under the Sixth Amendment to the United States Constitution, the State is required to inform the defendant of the nature and cause of the accusation against the defendant. In accordance with the Sixth Amendment, the Legislature has provided that an information “must be a plain, concise and definite written statement of the essential facts constituting the offense charged.” “Conclusory allegations are insufficient.” The Legislature has also provided that an information must specify the means by which the charged offense was committed or allege that the means are unknown. The purpose of these requirements is to prevent prosecutors from changing theories mid-trial, which in effect prejudices the defendant in his or her defense.

On April 26, 2001, the State charged West by information with open murder:

That BROOKEY LEE WEST, the Defendant(s) above named, having committed the crime of MURDER (Open Murder) (Felony-NRS 200.010, 200.030), on or during the year 1998, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the

⁷(...continued)

In short, if a petitioner wishes to have a claim considered that was not presented in the petition, as amended, petitioner must comply with the procedure for doing so by seeking leave to amend and then must address any procedural defenses that potentially would render such amendment futile. When a petitioner disregards the procedure for presenting new claims and instead seeks to bypass such issues by simply inserting the new claim in the reply, this Court disregards the new claim presented for the first time in the reply. The Federal Public Defender, again, repeatedly has been admonished in this regard.

The new claim raised for the first time in the reply therefore is disregarded.

1 peace and dignity of the State of Nevada, did then
2 and there wilfully, [sic] feloniously, without authority
3 of law, and with premeditation and deliberation, and
4 with malice aforethought, kill CHRISTINE SMITH,
a human being, by asphyxiation by suffocation
and/or manner or means unknown.

5 Considering that Smith's body was severely decomposed,
6 we conclude that the State provided West adequate notice in the
7 charging information regarding its theory of murder. The charging
8 information provided that the murder occurred sometime in 1998
9 and by means of suffocation, asphyxiation, or manner or means
unknown. "We are not concerned with whether the information
could have been more artfully drafted, but only whether as a
practical matter, the information provides adequate notice to the
accused." Moreover, contrary to West's contention, the State did
not change theories mid-trial.

10 119 Nev. at 419-20, 75 P.3d at 814-15 (citation footnotes omitted).

11 The state supreme court's rejection of this claim was neither contrary to nor an
12 unreasonable application of clearly established federal law.

13 Petitioner maintains that the State changed theories at trial. Petitioner contends
14 specifically that the State promised pretrial that it would rely exclusively on an asphyxiation
15 or strangulation theory and that the State then abandoned this alleged promise at trial by
16 arguing in closing that it did not have to prove the specific cause of death.

17 This argument is directly belied by the state court record. The State's position instead
18 was consistent throughout the proceeding.

19 As noted, the State charged West initially with killing Smith by asphyxiation,
20 strangulation and/or by manner or means unknown.

21 In the hearing relied upon by West, the State's representations, fairly read, indicated
22 only that it would not argue a specific cause other than asphyxiation or strangulation. Nothing
23 in the State's representations reflected an intent to abandon its alternative allegation that
24 Smith was killed by unknown cause or means, as, indeed, the State was *opposing* – in the
25 very same argument – a defense request to strike that alternative allegation.⁸ Any defense
26 assumption following the hearing that the State was abandoning the alternative allegation that

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28 ⁸See #21, Ex. 22, at 35-44.

1 the victim was killed by unknown manner or means would not have been a reasonable one,
2 and petitioner's strained *post hoc* reading of the transcript is unpersuasive.

3 In its opening statement, the State of course was not supposed to be arguing its theory
4 of the case but instead was supposed to be outlining what it believed that the evidence would
5 show. The State referred in this outline to the evidence regarding the plastic bag found
6 covering Smith's airways. The State also specifically noted, however, that the medical
7 examiner "pointed out that he could not make, to a degree of medical certainty, that he could
8 not reach a conclusion as to the cause or manner of death."⁹

9 Indeed, defense counsel's argument at the jury charge conference confirmed that the
10 defense understood that the State was maintaining – as the State had maintained from the
11 inception of the case – in the alternative that Smith was killed by suffocation or asphyxiation
12 and/or by manner or means unknown. In the jury charge conference, defense counsel sought
13 a special verdict and/or instruction specifically directing the jury, if it found West guilty, to
14 specify whether the jury found that she was killed by suffocation or asphyxiation or instead
15 by cause or means unknown. The defense further sought an advisory instruction, essentially
16 a directed verdict, instructing the jury that the State had not "tendered sufficient evidence to
17 prove death by an unknown cause."¹⁰ Jury Instruction No. 3, which the defense saw prior to
18 the charge conference, expressly stated that West was charged with murdering Smith "by
19 asphyxiation by suffocation and/or manner or means unknown."¹¹ The foregoing all transpired
20 prior to the closing argument where petitioner contends that the State "suddenly"¹² began
21 arguing that it did not have to prove how West killed Smith.

22 Petitioner's argument that the State suddenly shifted theories in this regard without
23 notice thus is belied by rather than supported by the record. The State alleged and
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25 ⁹#21, Ex. 26, at 24.

26 ¹⁰#24, Ex. 40, at 10-16.

27 ¹¹#24, Ex. 41.

28 ¹²#19, at 26, line 6.

1 maintained throughout that the victim was killed by suffocation, asphyxiation and/or other
 2 manner or means unknown. Consistent with its representations prior to trial, the State never
 3 sought to prove a specific cause of death other than suffocation or asphyxiation, only
 4 maintaining in the alternative that Smith was killed by other manner or means unknown.

5 Moreover, petitioner at bottom is maintaining that the State was required to give notice
 6 of something that it in truth was not required to prove – that the victim died from a specific
 7 known cause of death rather than from an unknown cause. As discussed, *supra*, with regard
 8 to Ground 1, the State was not required to prove the specific cause of death in order to
 9 establish *corpus delicti* under Nevada law. Nevada statutory law further expressly allowed
 10 the State to “allege that the means by which the defendant committed the offense are
 11 unknown or that the defendant committed it by one or more specified means.” N.R.S.
 12 173.075. The State invariably maintained – from the information at the very outset of the
 13 case consistently through the closing argument – that West killed Smith either by asphyxiation
 14 or suffocation or by some other manner or means unknown.

15 The Nevada Supreme Court’s rejection of this claim clearly was neither contrary to nor
 16 an unreasonable application of clearly established federal law as determined by the United
 17 States Supreme Court.

18 Ground 2 therefore does not provide a basis for federal habeas relief.¹³

19
 20 ¹³The state supreme court’s implicit rejection of the remaining exhausted aspects of Ground 2
 21 similarly was neither contrary to nor an unreasonable application of clearly established federal law as
 22 determined by the United States Supreme Court.

23 Petitioner maintains that the State’s witness list included a number of witnesses that the State had no
 24 intention of calling. She contends that an accurate witness list was necessary to prepare a proper defense,
 25 particularly in light of the allegedly vague charges. On a non-exhaustive review, the Court was able to
 26 determine that at least 28 of the 35 witnesses listed in the main witness list (#20, Ex. 10) in fact were called
 27 by the State. The Court’s review was non-exhaustive because not every trial transcript volume in the record
 28 contains an index of witnesses. Of the remaining 7 potential witnesses, assuming, *arguendo*, that they in fact
 were not called by the State at trial, the defense called one of the witnesses, and a number of stipulations
 were entered into during trial that eliminated the need for a number of the witnesses. See, e.g., #24, Ex. 37,
 at 149-53. The supplemental witness lists did not expand the list of any uncalled witnesses substantially.

It is subject to substantial question whether even a state law violation of substance was presented in
 (continued...)

Ground 3: Alleged Prosecutorial Misconduct in Closing Argument

In Ground 3, petitioner alleges that she was denied her right to due process in violation of the Fifth and Fourteenth Amendments because the State engaged in prosecutorial misconduct during closing argument. She alleges in particular that the State's closing argument: (A) improperly invited speculation by the jury as to Smith's cause of death; (B) inappropriately shifted the burden of proof to the defense; (C) invited the jury to convict West without proof of geographical jurisdiction; and (D) made an inappropriate appeal to religious bias.

The Supreme Court of Nevada rejected petitioner's claim of prosecutorial misconduct during closing argument in summary fashion at the end of its published decision, "conclud[ing] that West's contention lacks merit." 119 Nev. at 421, 75 P.3d at 815.

On federal habeas review of a state court conviction for constitutional error, the standard of review for a claim of prosecutorial misconduct, is "the narrow one of due process, and not the broad exercise of supervisory power" applied in federal criminal trials. See, e.g., *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144

¹³(...continued)

this regard. Clearly what was not presented was any federal constitutional issue of any substance, and petitioner presents no apposite United States Supreme Court authority contrary to the holding of the state supreme court implicitly rejecting this meritless claim. The State indisputably did not bury cause-of-death witnesses in a burdensomely long and over-inclusive witness list that then were sprung upon the defense at trial by surprise. Rather, the cause-of-death testimony proceeded at trial largely as would have been expected by both sides given what the forensic pathologist Dr. Telgenhoff had opined following the autopsy.

This point was a non-issue and certainly a constitutional non-issue. If there in truth were something of substance to the issue, it was incumbent upon petitioner to do more than conclusorily refer merely to the State listing "a number" of witnesses that it allegedly had no intention of calling. The witness list in question hardly was atypical for a first degree murder trial, and it certainly did not impair the ability of the experienced defense counsel to defend the case.

Petitioner further maintains that the information provided inadequate notice because the information alleged that the murder occurred "on or during the year 1998" without further specifying a date or range of dates. Petitioner cites no apposite United States Supreme Court authority contrary to the state supreme court's implicit rejection of this aspect of the claim.

Finally, petitioner's citation to Ninth Circuit authority, particularly pre-AEDPA Ninth Circuit authority, does not establish that the state supreme court's rejection of her claim was contrary to or an unreasonable application of United States Supreme Court authority.

(1986)(quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974)). “The relevant question is whether the prosecutor[’s] comments ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’” *Id.* (quoting *Donnelly*, 416 U.S. at 643, 94 S.Ct. at 1871). *Accord Duckett v. Godinez*, 67 F.3d 734, 743 (9th Cir. 1995).

With this standard in mind, the Court considers each subsidiary claim in turn.

Ground 3(A) – Alleged Invitation to Speculate as to Cause of Death

In Ground 3(A), petitioner contends that the State’s closing inappropriately invited speculation into the cause and manner of death when the State argued in the closing, *inter alia*, that “[w]e don’t have to prove what killed Christine Smith.”¹⁴ Petitioner urges that the State thereby argued “that it did not have to prove corpus delicti.”

Petitioner’s underlying premise on Ground 3(A) is wrong. Petitioner once again confuses a requirement that the State prove *corpus delicti* with an alleged requirement that the State prove the specific manner in which the murder was committed. As discussed above as to Ground 1, the State was *not* required to prove the specific manner in which the murder was committed to prove *corpus delicti*.¹⁵ In both Ground 2 and Ground 3(A), petitioner in essence seeks to impose a requirement on the State “through the back door” that the State did not have in the first instance – of identifying a specific cause of death through criminal agency. Nevada law quite simply imposed no such burden upon the State of identifying the specific manner by which the murder was committed. The State thus was not required, with regard to Ground 2, to give notice of only a specific cause of death in the charging instrument; and it was not improper, with regard to Ground 3(A), for the State to argue to the jury that it

¹⁴See #24-5, Ex. 40, at 118, line 13, through 119, line 18. In the portions of the argument selectively quoted by petitioner in the amended petition and reply, petitioner omits critical contextual statements. In these omitted statements, the State emphasized that it was required to prove that Brooke West murdered her mother and did so intentionally. See *id.*, at 118, lines 22-25, and 119, lines 16-18. The prosecutor was pointing out in the passage relied upon by West only that the State was not required to prove specifically how West murdered her mother, which, as discussed in the text, was a completely accurate statement of the law.

¹⁵See text, *supra*, at 6-7 & 8-9.

1 was not required to prove specifically how Brookey West killed Christine Smith. It was not
 2 improper for the State to so argue *because the State in fact was not required under Nevada*
 3 *law to prove the specific manner in which the murder was committed.*

4 The Nevada Supreme Court's rejection of Ground 3(A) therefore was neither contrary
 5 to nor an unreasonable application of clearly established federal law.¹⁶

6 ***Ground 3(B) – Alleged Shifting of the Burden of Proof to the Defense***

7 In Ground 3(B), petitioner contends that the State's closing argument inappropriately
 8 shifted the burden of proof to the defense when the State: (1) asserted that "[e]ven their own
 9 doctor can't tell you exactly what could have caused natural causes, the death of Christine
 10 Smith;"¹⁷ (2) stated that "[p]eople don't die of natural causes and wind up looking like that in
 11 a logical world," and asking the jury to "think about that bag [over Smith's airways] and
 12 consider whether it's [sic] presence is explained by any evidence that's inconsistent with the
 13 State's arguments here;"¹⁸ and (3) noted that the defense had introduced a crime scene
 14 analyst's fuzzy photograph of a prescription pill bottle allegedly impounded from the crime
 15 scene rather than introducing the pill bottle itself with the date clearly reflected on it.¹⁹

16 It would be a strange constitutional doctrine indeed that would preclude a prosecutor
 17 from directing the jury's attention to what evidence that in fact was introduced by the defense
 18 did not show, from asking the jury to consider the significance of a piece of the State's

19
 20 ¹⁶ Petitioner did not further pursue in the reply what apparently was a passing statement in the
 21 amended petition that the State also invited the state supreme court to speculate as to cause of death in oral
 22 argument on direct appeal. Following upon respondents' motion to dismiss, the Court's prior order directed
 23 petitioner – if she intended to pursue the allegation as a claim – to present in the reply argument and apposite
 24 authority supporting such a claim as well as proof of exhaustion of the claim. #44, at 9-10. Petitioner did not
 25 pursue the matter further in the reply, in an apparent implicit recognition that the assertion in the amended
 26 petition in this regard in fact was merely a passing statement. As this Court observed in the prior order, any
 27 such claim would appear to clearly lack merit. #44, at 10, lines 10-15.

28 ¹⁷ #24, Ex. 40, at 39.

¹⁸ *Id.*, at 142. Petitioner does not accurately quote the statements in the trial transcript. Although the
 variances are minor, an approximate paraphrase of a statement in the record should not be enclosed in
 quotes.

¹⁹ *Id.*, at 98-100. While the photograph in question was taken by a police crime scene analyst, it was
 introduced by the defense as Defendant's Exhibit F. See #22, Ex. 29, at 17 & 43-45; #24, Ex. 40, at 91-92.

evidence in the context of the remaining evidence introduced in the case, and from challenging the quality and significance of evidence in fact introduced by the defense. Petitioner cites no apposite United States Supreme Court authority precluding a state prosecutor from doing so on federal constitutional grounds.²⁰ Indeed, as respondents correctly note, in federal criminal trials, it is permissible for the prosecution to comment upon a defense failure to call a witness or present certain evidence so long as the prosecution does not comment on the defendant's failure to herself testify. *See, e.g., United States v. Cabrera*, 201 F.3d 1243, 1250 (9th Cir. 2000). Given the absence of any apposite United States Supreme Court authority supporting petitioner's claim and given the established practice in federal criminal trials, petitioner cannot carry her burden of demonstrating that the Nevada Supreme Court's rejection of Ground 3(B) was either contrary to or an unreasonable application of clearly established federal law.

Ground 3(C) – Jurisdiction

In Ground 3(C), petitioner alleges that the State failed to prove Nevada jurisdiction over the offense and that, in its closing argument, the State suddenly changed its theory of prosecution, effectively telling jurors that they could convict irrespective of where Smith died.

During the charge conference at trial, West requested a jury instruction "that says basically jurisdiction is something that the State must prove in this case" that "would be verbatim from the statute," in N.R.S. 171.020.²¹

The state statute referred to provides in full:

Whenever a person, with intent to commit a crime, does any act within this State in execution or part execution of such intent, which culminates in the commission of a crime, either

²⁰ Petitioner cites to a First Circuit decision in a federal criminal case and to a number of Nevada Supreme Court decisions. See #46, at 20 & n.10. Even if this Court were to assume, *arguendo*, that any of these decisions were apposite to the facts presented here, petitioner's burden under the AEDPA is to demonstrate that the decision of the Supreme Court of Nevada rejecting her claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as *determined by the Supreme Court of the United States*." 28 U.S.C. § 2254(d)(1) (emphasis added). Petitioner has not even begun to shoulder this burden with citation to apposite United States Supreme Court authority.

²¹ #24, Ex. 40, at 16 & 17.

1 within or without this State, such person is punishable for such
2 crime in this State in the same manner as if the same had been
committed entirely within this State.

3 N.R.S. 171.020.

4 The state district court denied the requested jury charge, stating that “[t]he short
5 answer is that it is a court question and not a jury question.” The court indicated that it would
6 entertain a motion to dismiss *nunc pro tunc* if one were made.²² None apparently was.

7 In its closing rebuttal argument, the State, *inter alia*, responded to defense arguments
8 directed to the absence of specific evidence as to when, where or how Smith allegedly was
9 killed. The State argued:

10 Before I go any further I ought to point out that it’s really
11 important to remember what the State doesn’t have to prove
12 here. Of course we have to prove some things, but there are
things we don’t have to prove either.

13 Please keep this in mind. We don’t have to prove what
14 killed Christine Smith. We don’t have to prove it was suffocation.

15 We have alleged it was by suffocation or some other
16 unknown means. We’re suggesting and arguing to you that the
evidence does show that Brooke West brought about her
mother’s death, that she did murder her.

17 We cannot prove, beyond a reasonable doubt, what that
18 instrumentality was, how she did it, but we don’t have to.

19 We also don’t have to prove when it happened.

20 Counsel made a big deal out of that, that maybe she died
21 four months later. If she did die four months later from February,
but her daughter still killed her, that’s okay. That’s consistent with
what we have alleged.

22 We’ve alleged it happened some time in 1998: We don’t
23 have to prove the day, don’t even have to prove the month.

24 We don’t have to prove where she died, whether it was in
the desert, in a motel room, at home. We don’t have to prove
25 that. We have to prove that it happened. And that Brook was
responsible for it, that she brought it about intentionally.

26 #24, Ex. 40, at 118-19.

27
28 ²²#24, Ex. 40, at 17.

1 Petitioner contends that the State's argument thereby allowed the jury to convict her
2 without the State having to prove jurisdiction.

3 It is established law in Nevada, however, first, that "Nevada jurisdiction over crimes
4 [allegedly] occurring in another state is a question of jurisdiction, not an element of the crime
5 charged," and second, that the question therefore "is a question of law to be decided by the
6 court, not to be submitted to the jury." *Shannon v. State*, 783 P.2d 942, 948 (Nev. 1989).

7 Petitioner acknowledges that "normally" jurisdiction is left to the court. She seeks to
8 brush the foregoing established law aside, however, on the basis that the case "presented
9 some unique problems" because the information charged that the crime occurred anytime
10 during 1998. Petitioner refers to witness testimony as to hearsay statements by West and
11 Smith that West was planning to take her mother to California as evidence that Smith actually
12 went to California, such that she may have died there.²³

13 Petitioner cites no Nevada law establishing that jurisdiction instead is a question for the
14 jury that the State must prove at trial when a case presents "unique problems" and/or the
15 State does not allege a date certain. The Supreme Court of Nevada, the final arbiter of
16 Nevada state law, implicitly rejected such a state law argument when it summarily rejected
17 this claim on West's direct appeal. The established law in Nevada instead is that jurisdiction
18 is a question for the court and is not a matter to be proved by the State before the jury at trial.
19 If petitioner wished to challenge jurisdiction directly – as opposed to indirectly in a challenge
20 to the State's closing argument – the procedure for doing so was clear, as outlined by the
21 state district court during the charge conference.

22 Ground 3(C) is a claim of prosecutorial misconduct based upon *an allegedly improper*
23 *closing argument* by the State depriving petitioner of a fundamentally fair trial. At bottom, the
24 State's assertion that it did not have to prove to the jury where the crime was committed was
25 completely true. Jurisdiction was not an element of the offense and was not even a jury issue
26

27 ²³In this regard, the defense had to concede in its closing argument that defense witness Steven
28 Cornet did not actually see West and Smith leave for California, or anywhere else. #24, Ex. 40, at 72.

1 in the first instance. The State's accurate statement in the closing – as to a jurisdictional
 2 issue that was not even before the jury – clearly could not have “so infected the trial with
 3 unfairness as to make the resulting conviction a denial of due process.” Petitioner cites
 4 absolutely no authority from the United States Supreme Court indicating that a statement in
 5 a closing argument as to such an issue that was even not before the jury gives rise to a
 6 federal constitutional violation in any sense.

7 The Nevada Supreme Court's rejection of Ground 3(C) accordingly clearly was neither
 8 contrary to nor an unreasonable application of clearly established federal law as determined
 9 by the United States Supreme Court.²⁴

10 ***Ground 3(D) – Alleged Appeal to Religious Bias***

11 In Ground 3(D), petitioner alleges that the State made an inappropriate appeal to
 12 religious bias in its rebuttal argument when it characterized defense counsel's reference to
 13 the plastic bag found covering Christine Smith's airways as a possible makeshift shroud as
 14 being “almost blasphemous.”

15
 16 ²⁴ Ground 3(C), again, is a claim based upon an allegedly improper argument in the State's closing.
 17 Ground 3(C) does not present a direct challenge to Nevada jurisdiction over the offense. If petitioner were to
 18 present and pursue such a direct challenge on federal habeas review, she would have to, *inter alia*, first
 exhaust such a claim in state court and then demonstrate that the claim that was exhausted gave rise to a
 cognizable federal constitutional claim on federal habeas review.

19 The Court notes in this regard that Christine Smith never was seen alive again by any trial witness,
 20 whether in California or elsewhere, after she was last seen in Las Vegas, Nevada in February 1998, and her
 decomposing body was found in Las Vegas. These facts tend to support a fairly strong inference that Smith
 never left the state prior to her death. Moreover, N.R.S. 171.020 expressly permits conviction in Nevada for a
 21 crime where the commission of the offense culminates in another state where any act is taken within this
 state in execution or part execution of the intent to commit the crime. *See, e.g., Shannon*, 783 P.2d at 948
 22 (partially overruling prior case authority limiting the reach of the statute). The State argued at trial that West
 presented the story that she was taking Smith to California as a covering ruse to explain the disappearance of
 23 her mother prior to instead killing her. Under that scenario, even if, *arguendo*, West took Smith over the state
 line into California prior to killing her, jurisdiction arguably would exist under N.R.S. 171.020. Petitioner
 24 presents no case authority establishing that the state courts were required to accept hearsay testimony that
 West and Smith *said* that West was going to take Smith to California as proof that Smith actually *went* to
 25 California before her death. The hearsay statements do not establish the truth of the matter asserted,
 particularly when the statements are statements of professed intent or plan, not of then-current fact.

26
 27 Again, however, Ground 3(C) claims that the State engaged in prosecutorial misconduct in its closing
 argument. If petitioner wished to directly challenge Nevada jurisdiction over the offense, it was incumbent
 28 upon her to present such a challenge to the state courts via a proper procedure and then demonstrate a
 federal constitutional basis for review if she sought to pursue the issue further later in federal court.

1 During the defense closing argument, defense counsel referred to the plastic bag
2 covering Smith's nose and mouth as a "shroud." Counsel referred to the common practice
3 in society of covering the face of a dead person, including examples of a hospital or morgue
4 using a sheet to cover a decedent.²⁵

5 The prosecuting attorney presenting the rebuttal maintained that a shroud was very
6 different from the plastic bag that was found covering Smith's airways. Counsel argued that
7 a shroud covered the entire face and was not tied tightly, as it was simply laid over the body
8 to cover it out of respect. The plastic bag, in contrast, was tied tightly over the victim's
9 airways.²⁶

10 In the course of this argument, the prosecutor said, *inter alia*: "To compare a tightly tied
11 plastic bag to a shroud is almost blasphemous." Defense counsel objected to the "almost
12 blasphemous" comment as a personal attack on counsel. The prosecutor maintained that he
13 was not attacking counsel personally, and the trial court directed that the argument proceed.²⁷

14 The state supreme court's rejection of the claim in Ground 3(D) was neither contrary
15 to nor an unreasonable application of clearly established federal law. The brief verbal
16 sparring between counsel over the prosecutor's remark was a molehill, at best, clearly not a
17 mountain. Petitioner cites no apposite authority from the United States Supreme Court that
18 was contrary to the state court's ruling or that the state supreme court unreasonably applied.
19 The prosecutor clearly did not appeal to the jury during the guilt phase to find West guilty
20 because of her religious affiliation. Nor did the prosecutor appeal to the jury during the guilt
21 phase to convict West based upon religious precepts rather than upon the law given by the
22 trial court and the evidence introduced at trial. Clearly, the prosecutor's remark did not so
23 infect the trial with unfairness as to make the resulting conviction a denial of due process.

24 Ground 3, including all subparts, thus does not provide a basis for habeas relief.

25
26 ²⁵#24, Ex. 40, at 77-78.

27 ²⁶*Id.*, at 141.

28 ²⁷*Id.*, at 141-42.

1 **Ground 4: Effective Assistance of Counsel**

2 In Ground 4, petitioner alleges that she was denied her right to effective assistance of
3 counsel under the Sixth and Fourteenth Amendments because: (A) trial counsel failed to
4 subpoena, review and present California medical records for Christine Smith from 1996, from
5 prior to her living in Nevada in 1998; and (B) trial counsel failed to have Smith's medical
6 records from Southwest Medical Associates in Nevada reviewed and explained by an expert
7 witness at trial.

8 On a claim of ineffective assistance of counsel, a petitioner must satisfy the two-
9 pronged test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674
10 (1984). She must demonstrate that: (1) counsel's performance fell below an objective
11 standard of reasonableness; and (2) counsel's defective performance caused actual
12 prejudice. On the performance prong, the issue is not what counsel might have done
13 differently but rather is whether counsel's decisions were reasonable from his perspective at
14 the time. The court starts from a strong presumption that counsel's conduct fell within the
15 wide range of reasonable conduct. On the prejudice prong, the petitioner must demonstrate
16 a reasonable probability that, but for counsel's unprofessional errors, the result of the
17 proceeding would have been different. *E.g., Beardslee v. Woodford*, 327 F.3d 799, 807-08
18 (9th Cir. 2003).

19 **Ground 4(A): Effective Assistance – California Medical Records**

20 In Ground 4(A), petitioner alleges that she was denied effective assistance because
21 trial counsel failed to subpoena, review and present California medical records for Christine
22 Smith from 1996. She alleges in particular that the California medical records contradicted
23 testimony by Nurse Practitioner Judy Zito-Prey that Smith did not have a medical condition
24 in Nevada in January 1998 that indicated that she was about to die of natural causes.
25 Petitioner alleges that the California medical records contradicted Zito-Prey's testimony
26 because the records allegedly reflected that Smith had chronic obstructive pulmonary disease
27 and an enlarged heart.

28 Expert medical testimony from the trial related to this claim included the following.

1 Nurse Practitioner Judy Zito-Prey testified, *inter alia*, as follows.²⁸ She saw Christine
 2 Smith at Southwest Medical Associates in Nevada for a total of five visits from April 1, 1997,
 3 through January 5, 1998. Smith reported, *inter alia*, a history of adult onset asthma when she
 4 presented initially at the first office visit on April 1, 1997; and she was seeking a renewal of
 5 her prescription for asthma. She reported that she had stopped smoking ten years before.
 6 Smith reported mild shortness of breath on exertion. Zito-Prey requested that Smith execute
 7 a release for her prior medical records from California, but Smith either never did so or the
 8 records were not obtained.²⁹

9 Two pulmonary function tests, or spirometry readings, of Smith's respiratory ability
 10 were done at Southwest Medical. The first, conducted in January 1997, before Zito-Prey was
 11 established as Smith's primary care provider, reflected a "lung age" of approximately 132
 12 years. The second, conducted in April 1997, reflected a lung age of approximately 103 years.
 13 The findings were consistent with Smith's report of a prior history of smoking. Smith exhibited
 14 moderate obstruction, which potentially was attributable to the reported asthma.³⁰

15 Zito-Prey started Smith on a Maxair autoinhaler for asthma attacks. A few weeks later,
 16 she added a Vanceril inhaler as a preventative after Smith had a flare-up.³¹

17 Smith's heart rate and blood pressure were within normal limits for a woman of her
 18 age. Zito-Prey did not ascertain the presence of any heart problems from her examination.³²

19 ///

20
 21 ²⁸A nurse practitioner, or advanced practitioner of nursing, may engage, after designated education,
 22 in selected medical diagnosis and treatment in direct patient care and in certain circumstances may prescribe
 23 medication. See N.R.S. 632.237. In Zito-Rey's case, she had been a nurse practitioner for twenty-one years
 24 at the time of the trial, after obtaining a bachelors in nursing and attending a two year program at a medical
 school. She was certified in adult medicine, which encompassed internal medicine. Zito-Prey was qualified
 and licensed by her training and certification to render a diagnosis and prescribe certain kinds of medication.
 See #23, Ex. 35, at 3-25 (outside the presence of the jury) & 28-33 (before the jury).

25 ²⁹#23, Ex. 35, at 34-36, 39, 47-48, 54 & 58-59.

26 ³⁰*Id.*, at 36-41 & 73-76.

27 ³¹#23, Ex. 35, at 38-40.

28 ³²*Id.*, at 45-46, 57 & 86.

1 Zito-Prey's overall diagnostic impression was that Smith suffered from mild asthma and
2 a number of other minor ailments, which are unrelated to the specific allegations made in
3 Ground 4(A). Nothing from the visits indicated to Zito-Prey as of the last visit on January 5,
4 1998, that Smith was about to die of any known natural cause.³³

5 Zito-Prey acknowledged that a Maxair inhaler could in rare cases cause paradoxical
6 bronchospasms and other complications that potentially could be life-threatening. She further
7 acknowledged that the moderate obstruction reflected by the pulmonary function testing also
8 could result from, *inter alia*, an allergic reaction or congestive heart failure. Smith, however,
9 did not exhibit the additional symptoms that would accompany congestive heart failure, such
10 as swelling of the feet and ankles.³⁴

11 The forensic pathologist, Dr. Gary D. Telgenhoff, M.D., testified, *inter alia*, that Smith's
12 arteries were decomposed but present at the time of the autopsy, and there was no
13 calcification that would indicate hardening of the arteries. He could not rule out through the
14 autopsy, however, the possibility that Smith died of a heart attack or other heart disease.³⁵

15 Dr. Telgenhoff similarly acknowledged that the Maxair inhaler and the Vanceril inhaler
16 could cause potentially life-threatening complications in rare cases.³⁶

17 Dr. Telgenhoff also testified that the spirometry readings reflected a 132 lung age at
18 one point and that Smith had moderate pulmonary obstruction. In cases of severe asthma,
19 an asthma attack, or status asthmaticus, could cause death, but Smith's records from
20 Southwest Medical Associates reflected moderate rather than severe asthma. Dr. Telgenhoff
21 testified that the pulmonary function tests additionally reflected restriction on inspiration. Such
22 a restriction could be consistent with a number of potential causes, including congestive heart
23 failure preventing the lungs from expanding fully. #22, Ex. 31, at 11-18.

24
25 ³³*Id.*, at 60-61.

26 ³⁴*Id.*, at 68-72, 76-77 & 85-86.

27 ³⁵#22, Ex. 30, at 34-35; *id.*, Ex. 31, at 21.

28 ³⁶*Id.*, at 69-73; *id.*, Ex. 31, at 5-11.

1 The defense medical expert, family practitioner Dr. James Anthony, M.D., similarly
 2 testified that the Southwest Medical pulmonary function testing reflected moderate obstruction
 3 on expiration and a restrictive defect on inspiration. Dr. Anthony would have pursued the
 4 condition with more aggressive medical treatment than did Nurse Practitioner Zito-Prey. Dr.
 5 Anthony testified that the restrictive defect on inspiration was consistent with a number of
 6 potential causes, including possibly an enlarged heart or pleural effusion associated with
 7 congestive heart failure. The symptoms would include shortness of breath on minimal
 8 exertion and swelling of the legs. He further testified consistently with the other health care
 9 providers as to the potential complications from use of asthma inhalers in rare cases.³⁷

10 On state post-conviction review, petitioner attached documents with a supporting brief
 11 that she maintained were California medical records for Christine Smith that she obtained by
 12 subpoena. The Court will discuss the particular content of the material tendered by West in
 13 the state courts *infra*.

14 After holding an evidentiary hearing on this claim, the district court denied relief.

15 On the state post-conviction appeal, the Supreme Court of Nevada rejected the claim
 16 presented to that court on the following grounds:

17 . . . [A]ppellant claimed that her counsel was ineffective for
 18 failing to have the victim's medical records from California
 19 subpoenaed, reviewed, and explained to the jury at trial.
 20 Appellant asserted that this information would have bolstered her
 21 defense of death by natural causes by demonstrating that the
 22 victim was very ill prior to her death and contradicting the nurse
 23 practitioner's trial testimony.

24 Appellant failed to demonstrate that her counsel was
 25 ineffective. At the evidentiary hearing, counsel testified that
 26 although his team followed some leads and attempted to obtain
 27 the California medical records, they were unable to obtain the
 28 records prior to trial. The record indicates that appellant's recent
 medical records from Nevada were introduced and admitted as
 exhibits at trial. Counsel had a medical expert testify on
 appellant's behalf at trial, and that expert testified that his review

37 #24, Ex. 39, at 27-43, 48 & 57-69. The court reporter transcribed "pleural effusion" as "pleura
 fusion," but it is clear from the context that the physician would have been referring to pleural effusion, an
 increase in fluid in the space enveloping the lungs often associated with congestive heart failure.

1 of the Nevada medical records indicated that the victim was very
2 ill and suffered from severe lung disease prior to her death. This
3 testimony contradicted the nurse practitioner's testimony that was
4 presented earlier in the trial. The defense's expert also testified
5 that, although very rare, death was a possible side effect of one
6 of the medications the victim was taking for her asthma. The
7 district court found that appellant's counsel "rigorously cross-
8 examined the State's witnesses regarding the victim's medical
history," and the "introduction of the more recent medical records
from Nevada significantly diminished the relevance of any older
medical records from California." The district court also found
that appellant's counsel was not ineffective. We conclude that
the district court's determination was supported by substantial
evidence and was not clearly wrong. Accordingly, we conclude
the district court did not err in denying this claim.

9 #29, Ex. 121, at 2-3.

10 On federal habeas review, petitioner alleges specifically that "Smith's California
11 medical records depicts a diagnosis of Chronic Obstructive Pulmonary Disease (COPD) and
12 a heart condition which is demonstrated by an abnormal ECG showing an enlarged heart."
13 Petitioner urges that the California records "could have changed the outcome at trial" because
14 the records allegedly demonstrated that Nurse Practitioner Zito-Prey's assessment that Smith
15 had asthma and that there was nothing to indicate that she was about to die of natural causes
16 was "an inappropriate diagnosis."³⁸

17 Federal habeas counsel supported the foregoing allegations with the following record
18 citation: "Ex. 66 at 7J." #19, at 32, line 12. No California medical records are found at that
19 single page cited. That single page instead is a page from West's state petition presenting
20 argument on an unrelated claim.

21 There otherwise is no citation to the California medical records or discussion of their
22 specific content in the amended petition or reply. The Court had to search page by page
23 through state court record materials to find the California medical records.

24 What the Court ultimately found was nine pages of purported California medical
25 records from late 1996 embedded within another 32 pages of handwritten commentary as to
26 their purported medical significance. The purported medical commentary was generated by

27
28 ³⁸#19, at 32.

1 the lay, *i.e.*, lay in not in any sense being a qualified medical expert, and hardly disinterested
 2 petitioner serving a life sentence without the possibility of parole for first-degree murder.³⁹

3 Only two pages from the alleged medical records⁴⁰ have any bearing upon the specific
 4 allegations presented on federal habeas review within Ground 4(A).⁴¹

5 A purported radiology report from an October 10, 1996, chest x-ray states:

6
 7 There is moderately enlarged hyperinflation, consistent
 8 with chronic obstructive pulmonary disease. There is mild
 9 bibasilar atelectasis noted. The thoracic spine shows fairly
 10 marked osteoporosis with mild compressive changes in the lower
 11 thoracic spine noted.

12 IMPRESSION: Marked chronic obstructive pulmonary
 13 disease and other age related changes.
 14 Mild bibasilar atelectasis. Otherwise,
 15 negative study.

16 #26-2, Ex. 76, Part 3, at electronic docketing page 40.

17 The foregoing radiology report does not demonstrate that Nurse Practitioner Zito-Prey
 18 failed to diagnose a condition threatening Christine Smith with imminent death. The medical
 19 testimony at trial, including that by the defense medical expert, reflected that asthma is a form
 20 of obstructive pulmonary disease and that the Nevada pulmonary testing showed moderate
 21 obstruction.⁴² More to the point, a radiology report is a report of x-ray findings, not a report
 22 by a treating primary care provider or pulmonary specialist assessing the significance of the
 23 results in diagnosing and treating a patient after examining the patient and considering

24 ³⁹See #26-2, Ex. 76, Part 3, at electronic docketing pages 22 through 62.

25 ⁴⁰The Court has assumed, *arguendo*, that the purported medical records are authentic. The Court
 26 has not been presented with any indication, however, that the purported records have been authenticated in
 27 either state or federal court. It instead appears that the documents currently in the state court record were
 28 first tendered in the state courts directly by an interested party in the litigation rather than introduced through a
 proper records custodian. While the Court has assumed *arguendo* that the records are authentic, it has been
 provided no reliable assurance that they in fact are authentic.

⁴¹The remaining largely unremarkable records consist of a one-page patient history intake form, with
 handwritten notes; three pages of checkoff treatment plan sheets with checkoffs and/or handwritten notes
 directing, *e.g.*, certain lab work; two pages of urinalysis lab results, and a radiology report of a CT scan of the
 brain.

⁴²See, *e.g.*, #22, Ex. 31, at 15-16 (Dr. Telgenhoff); #24, Ex. 39, at 22 & 30 (Dr. Anthony).

1 possible differential diagnoses. That is, a radiology report is a diagnostic tool, not itself a
2 diagnosis by a treating physician. Petitioner has tendered absolutely no competent medical
3 evidence in any way tending to establish that any of the findings in the radiology report
4 reflected that the victim was in imminent peril of dying from natural causes. The lay and not
5 disinterested petitioner cobbled together in her handwritten submission in state court
6 purported excerpts from medical texts in an effort to demonstrate that the California medical
7 records indicated that Christine Smith was on the verge of death from multiple possible
8 causes. Brookey West, however, is in no sense competent to provide expert medical
9 testimony or evidence in either state or federal court.

10 Similarly, the remaining page from the medical records does not demonstrate by
11 competent evidence that Smith had an enlarged heart or that, if she did, she was in imminent
12 peril of dying from health risks associated with such a condition. The remaining page is not
13 a report by a competent medical expert opining as to the significance of electrocardiogram
14 results. The page instead is a page of raw results from the electrocardiogram – *i.e.*, the page
15 with the irregular lines generated by the recording pens or other means during the
16 electrocardiogram.⁴³ The page does not include any written material interpreting the results
17 by a qualified medical professional. The interpretation of what the electrocardiogram results
18 purportedly meant was provided, once again, by the lay and not disinterested petitioner,
19 Brookey West. Petitioner, again, is not a competent witness to provide expert medical
20 testimony, including interpreting electrocardiogram results. Moreover, an electrocardiogram,
21 like a radiology report, is a diagnostic tool, not a diagnosis. Petitioner has tendered no
22 competent medical evidence tending to establish that the electrocardiogram results reflected
23 that Smith was facing probable imminent death from natural causes due to an enlarged heart
24 in 1996 or thereafter.

25 Petitioner accordingly has failed to demonstrate that the decision of the Supreme Court
26 of Nevada rejecting the claim in federal Ground 4(A) was either contrary to or an

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28 ⁴³#26-2, Ex. 76, Part 3, at electronic docketing page 34.

unreasonable application of *Strickland*. This Court would reach the same result on *de novo* review, as petitioner has not tendered competent medical evidence supporting the allegations made regarding the claimed import of the purported California medical records. Nor has petitioner demonstrated that the prerequisites under the AEDPA for a federal evidentiary hearing have been satisfied.

Ground 4(A) thus does not provide a basis for federal habeas relief.⁴⁴

Ground 4(B): Effective Assistance – Southwest Medical Lab Results

In Ground 4(B), petitioner alleges that she was denied effective assistance because trial counsel failed to have an expert review lab results in the Southwest Medical Associates medical records from Christine Smith's care in Nevada referred to above in Ground 4(A).

Petitioner alleges that the Southwest Medical records "contain lab tests that show negative results" and that "present a picture of a very ill patient."⁴⁵ However, once again, federal habeas counsel does not cite to or discuss the specifics of any particular lab results based upon competent medical evidence as to their significance. In support of the allegations in Ground 4(A), counsel provides only the following record citation: "Ex. 75."⁴⁶ No medical records are found in that record exhibit. The record exhibit instead is an amended state court petition filed by petitioner in which she alleges that the Southwest Medical records "contain lab results that show negative results" and "present a picture of a patient who is very ill."⁴⁷

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⁴⁴ Petitioner refers to testimony by defense counsel at the state court evidentiary hearing purportedly asserting that there "may have been" something in the California records that he should have presented to an expert for review before trial. Defense counsel obviously was confused, however, as to which records came from California. He immediately stated that "I'm basing that on what I'm hearing from Ms. West about this blood work." See #27, Ex. 86, at 27-28. The blood work, however, was the subject not of the California records but instead of the *Nevada* records that are the subject of Ground 4(B). In all events, however, whether confused or not, defense counsel's evidentiary hearing testimony as to what "may have been" helpful is not controlling in determining prejudice under *Strickland*.

⁴⁵ #19, at 32.

⁴⁶ #19, at 32.

⁴⁷ #25, Ex. 75, at 7H.

1 Petitioner has the burden of proof in seeking federal habeas relief. Merely parroting
2 back the allegations of a lay petitioner (again, lay in not being a qualified medical expert) in
3 the state courts as to the alleged significance of lab test results does not come even remotely
4 close to carrying that burden. Whatever Brookey West may have said in the state courts as
5 to the alleged significance of the Southwest Medical lab results has absolutely no bearing on
6 the issue because she is not a competent witness to provide expert medical testimony. If
7 federal habeas counsel is not going to even begin to address the significance of actual
8 specific lab results -- with appropriate record citation to properly authenticated evidence and
9 supporting *competent* medical evidence as to the significance of the specific lab results vis-à-
10 vis cause of death -- this Court readily reaches the conclusion that Ground 4(B) does not
11 provide a basis for federal habeas relief. The Court reaches this conclusion, on the minimal
12 showing and argument made, whether under deferential AEDPA review or instead on *de novo*
13 review. At bottom, the claim as presented on federal habeas review simply is not supported
14 by citation to competent medical evidence.

15 Ground 4(B) thus does not provide a basis for federal habeas relief.⁴⁸

16 ***Consideration of Possible Issuance of a Certificate of Appealability***

17 Under Rule 11 of the Rules Governing Section 2254 Cases, the district court must
18 issue or deny a certificate of appealability (COA) when it enters a final order adverse to the
19 applicant. A district court order granting or denying a certificate of appealability does not
20 eliminate the requirement that the petitioner must file a timely notice of appeal in order to
21 appeal the court's judgment. A motion to reconsider the order regarding a certificate of
22 appealability does not extend the time to appeal.

23 *////*

24
25 ⁴⁸ Trial counsel's testimony at the state evidentiary hearing as to whether having an expert review the
26 records "may have been helpful" again is not controlling in determining prejudice under *Strickland*. See note
27 44, *supra*. Petitioner not only must show that counsel failed to take some action. She must show further that
28 there was a reasonable probability that the outcome of the trial would have been different but for the alleged
error. West has failed to demonstrate same on either Ground 4(A) or Ground 4(B). A "negative" medical test
result of course refers to the absence of the thing tested for, not to a "negative" result in the lay sense.

1 As to the claims rejected by the district court on the merits, under 28 U.S.C. § 2253(c),
 2 a petitioner must make a "substantial showing of the denial of a constitutional right" in order
 3 to obtain a certificate of appealability. *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S.Ct.
 4 1595, 1603-04, 146 L.Ed.2d 542 (2000); *Hiivala v. Wood*, 195 F.3d 1098, 1104 (9th Cir.
 5 1999). To satisfy this standard, the petitioner "must demonstrate that reasonable jurists
 6 would find the district court's assessment of the constitutional claim debatable or wrong."
 7 *Slack*, 529 U.S. at 484, 120 S.Ct. at 1604.

8 As discussed previously, the Court will grant a certificate of appealability as to the claim
 9 challenging the sufficiency of the evidence in Ground 1 that was presented in the amended
 10 petition,⁴⁹ as jurists of reason would find the issue to be a debatable one. The Court denies
 11 a COA as to the claims in Grounds 2, 3 and 4, for the reasons outlined below.

12 **Ground 2**

13 Jurists of reason would not find the rejection of Ground 2, regarding alleged inadequate
 14 notice in the charging instrument, to be debatable or wrong. At bottom, petitioner is
 15 maintaining that the State was required to give notice of something that it was not required
 16 to prove under Nevada law – that the victim died from a specific known cause rather than
 17 from an unknown cause through criminal agency. Moreover, petitioner's allegation that the
 18 State changed theories in its closing argument is belied by rather than supported by the
 19 record. Reasonable jurists therefore would not find debatable or wrong this Court's
 20 conclusion that the state supreme court's rejection of this claim was neither contrary to nor
 21 an unreasonable application of clearly established federal law. See text, *supra*, at 11-14.

22 **Ground 3(A)**

23 Jurists of reason would not find the rejection of Ground 3(A) to be debatable or wrong.
 24 In Ground 3(A), petitioner alleges that the State engaged in prosecutorial misconduct when
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26
 27 ⁴⁹ A COA is denied as to further pursuit of the apparently unexhausted claim that petitioner sought to
 28 raise for the first time in the reply as to Ground 1. Reasonable jurists would not find the Court's rejection of
 this late-breaking claim for counsel's failure to seek leave to amend the petition to be debatable or wrong.
 See note 7, *supra*.

1 it argued in its closing that it did not have to prove specifically how West killed her mother.
2 This claim, like Ground 2, proceeds from the erroneous premise that the State was required
3 to prove a specific cause of death to prove *corpus delicti* under Nevada law. This premise
4 is flawed. Reasonable jurists therefore would not find debatable or wrong this Court's
5 conclusion that the state supreme court's rejection of this claim was neither contrary to nor
6 an unreasonable application of clearly established federal law. See text, *supra*, at 16-17.

7 **Ground 3(B)**

8 Jurists of reason would not find the rejection of Ground 3(B) to be debatable or wrong.
9 Petitioner alleges that the State engaged in prosecutorial misconduct when the State
10 allegedly shifted the burden of proof to the defense in its closing argument. The prosecutor,
11 at bottom, challenged the significance and import of sundry defense evidence in the case.
12 Petitioner cites no apposite United States Supreme Court authority establishing that the
13 argument was improper, and the argument would have been entirely proper in a federal
14 criminal trial under established law. Reasonable jurists thus would not find debatable or
15 wrong this Court's conclusion that the state supreme court's rejection of this claim was neither
16 contrary to nor an unreasonable application of clearly established federal law. See text,
17 *supra*, at 17-28.

18 **Ground 3(C)**

19 Jurists of reason would not find the rejection of Ground 3(C) to be debatable or wrong.
20 Petitioner alleges that the State engaged in prosecutorial misconduct when the State argued
21 in its closing that it was not required to prove where Christine Smith was murdered. The State
22 in fact was not required to prove to the jury where Smith was murdered, as geographical
23 jurisdiction is not an element of the offense and is not a question for the jury under Nevada
24 law. A prosecutor's passing statement going to an issue that was not even before the jury
25 hardly so infected the trial with unfairness as to make the resulting conviction a denial of due
26 process. Reasonable jurists thus would not find debatable or wrong this Court's conclusion
27 that the state supreme court's rejection of this claim was neither contrary to nor an
28 unreasonable application of clearly established federal law. See text, *supra*, at 18-21.

1 **Ground 3(D)**

2 Jurists of reason would not find the rejection of Ground 3(D) to be debatable or wrong.
3 Petitioner alleges that the State engaged in prosecutorial misconduct when the prosecutor
4 referred to defense counsel's argument that the plastic bag over the victim's airways may
5 have constituted a shroud as "almost blasphemous." The matter was a molehill, if that, rather
6 than a mountain, and the prosecutor clearly did not seek to obtain a conviction in the guilt
7 phase by an appeal to religious bias. Reasonable jurists thus would not find debatable or
8 wrong this Court's conclusion that the state supreme court's rejection of this claim was neither
9 contrary to nor an unreasonable application of clearly established federal law. See text,
10 *supra*, at 21-22.

11 **Ground 4(A)**

12 Jurists of reason would not find the rejection of Ground 4(A) to be debatable or wrong.
13 Petitioner alleges that she was denied effective assistance of trial counsel when counsel
14 failed to obtain and use medical records from California from prior to the time that she lived
15 in Nevada. Petitioner failed to tender competent medical evidence tending to demonstrate
16 a reasonable probability that introduction of the California medical records, if, *arguendo*
17 authentic, would have changed the outcome at trial. Petitioner's argument as to the purported
18 significance of the records is based upon *petitioner's own lay assessment* as to what the in
19 truth sparse medical records signified. Over and above the fact that petitioner is an interested
20 party in these proceedings, she clearly is not a competent witness to provide expert medical
21 testimony establishing the significance of medical records, whether radiology reports or
22 electrocardiogram results. Reasonable jurists would not find debatable or wrong this Court's
23 conclusion that the state supreme court's rejection of this claim was neither contrary to nor
24 an unreasonable application of clearly established federal law. See text, *supra*, at 23-30.

25 **Ground 4(B)**

26 Jurists of reason would not find the rejection of Ground 4(B) to be debatable or wrong.
27 Petitioner alleges that she was denied effective assistance of trial counsel when counsel
28 failed to have an expert review lab results in the Nevada medical records introduced into

1 evidence at trial. Federal habeas counsel did not cite to or discuss any specifics in the
2 medical records in question. Counsel instead merely parroted back the lay petitioner's
3 allegation in the state courts that the lab results included "negative results" that "present a
4 picture of a very ill patient." On the virtually nonexistent showing and argument made,
5 reasonable jurists would not find debatable or wrong this Court's conclusion that the state
6 supreme court's rejection of this claim was neither contrary to nor an unreasonable
7 application of clearly established federal law. Anything that the lay petitioner herself said
8 about the purported significance of the Nevada medical records again is not competent
9 medical evidence. See text, *supra*, at 30-31.

10 A certificate of appealability therefore will be denied as to these claims.

11 IT THEREFORE IS ORDERED that the petition shall be DENIED on the merits and
12 that this action shall be DISMISSED with prejudice.

13 IT FURTHER IS ORDERED that a certificate of appealability is GRANTED as to
14 Ground 1, except for the claim raised for the first time in the reply, and is DENIED as to
15 Grounds 2, 3 and 4.

16 The Clerk of Court shall enter final judgment accordingly in favor of respondents and
17 against petitioner, dismissing this action with prejudice.

18 DATED: September 9, 2010

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22 _____
KENT J. DAWSON
United States District Judge
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